

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>MARIA C. RUSHER</b>	)	
Claimant	)	
V.	)	
	)	Docket No. 1,071,286
<b>STATE OF KANSAS</b>	)	
Respondent	)	
AND	)	
	)	
<b>STATE SELF-INSURANCE FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the September 30, 2015, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on February 4, 2016.

**APPEARANCES**

George H. Pearson, of Topeka, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found the date of injury by repetitive trauma to be January 17, 2013, the day claimant was told by a physician, her hand problems were related to her work activities. The ALJ found claimant provided respondent with timely notice that her injuries were related to her work and that, although claimant did not adhere to the specifics of the notice statute, the purpose of the notice statute is to put an employer on notice that an employee has been injured due to work, and respondent received that notice. The ALJ adopted the opinion of board certified orthopedic surgeon Edward J. Prostic, M.D., that claimant has a 12 percent whole body functional impairment.

Respondent appeals, arguing claimant failed to provide timely notice of her repetitive trauma and submits claimant's right to compensation depends on the legal date of injury, which respondent contends is November 26, 2012, the date claimant's primary care physician, Patrick Raney, M.D., assigned restrictions. Respondent contends claimant's notice provided to her supervisor on January 18, 2013, was untimely. In the event claimant's claim is found compensable, respondent argues claimant should be entitled only to a 3 percent impairment to each upper extremity based on the medical opinions of board certified orthopedic surgeon, Michael M. Hall, M.D.

Claimant contends the ALJ's Award should be affirmed.

The issues on appeal are:

1. What is claimant's date of injury by repetitive trauma?
2. Did claimant provide timely notice of her alleged repetitive trauma injury?
3. What is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

Claimant testified she has worked for respondent in various departments for around 28 years. On January 17, 2013, claimant was working in housekeeping, performing her duties within the capital complex. Claimant's work duties involved physical manual labor type work that included dusting, vacuuming, lifting and picking up heavy trash repetitively for 8 hours and setting up tables and chairs if needed.

Claimant testified she began having hand pain and related it to her work. Claimant complained to respondent about the problems with her hands and wrists for six months before her February 18, 2013, right carpal tunnel surgery. Claimant testified she voiced her complaints to her supervisor, Rose Alexander, every day and indicated she also complained to some of her co-workers. She reported she was vacuuming 2½ hours every day and when she did, her right hand would go numb. Claimant testified she started alternating using her left hand when the pain was too much on the right and, before long, the pain was in both hands and wrists, with the right being worse than the left. Claimant indicated that all of her work activities caused her to have pain in her hands, but later testified it was only the dusting and vacuuming duties that caused the problems in her hands and wrists. Claimant testified she continued to report these problems to her supervisor.

Claimant indicated the only response she received when she reported the pain in her hands and wrists was to take five minutes and go back to work. She was never asked to fill out an accident report. Claimant felt she was being ignored by respondent during the six months before her diagnosis.

With no direction from respondent, claimant sought treatment with her primary physician, Dr. Raney. Claimant testified Dr. Raney never indicated her problems were work-related. Claimant was referred for an EMG with Dr. Taijun Zhao on January 17, 2013, and was diagnosed with bilateral carpal tunnel syndrome. Dr. Zhao told claimant her carpal tunnel syndrome was work-related.

On January 18, 2013, the day after her testing and diagnosis, claimant returned to work for respondent and reported the diagnosis and that she was going to have surgery. Claimant indicated this conversation took place in the morning. She does not recall any conversation about workers compensation taking care of her medical expenses. She was not asked, and did not ask, to fill out an accident report.

Claimant acknowledged she had a prior condition or accident where an accident report was filled out, so she knew one was needed for this situation. But claimant did not fill one out until later. Claimant could not remember when this prior accident or condition occurred. Claimant does not know why she did not fill out an accident report.

Claimant testified:

Q. (By Mr. Burghart) Was it the day after you saw Dr. Zhao that you spoke with Rose? Are you sure about that or not sure about that?

A. I'm pretty sure I tell her about when the doctor told me that's work-related to my work, repetitive work.

Q. We know you told her at some point. But the question is, when did you tell her? Was that the day after you saw Dr. Zhao or was it February 12th or was it some other time?

A. February 12 I cannot quite remember that. But I do remember telling what the doctor told me, I have to have surgery as soon as possible. And that was after I see the doctor with the nerve.

Q. Which doctor told you you need surgery?

A. The one that did the nerve check.

Q. Dr. Zhao?

A. Dr. Zhao.

Q. When you told Rose did she fill out the accident report at that time, do you know?

A. No.

MR. PEARSON: No, you don't know, or no, she didn't?

A. No, she didn't file the accident report after I tell you before my surgery.

Q. (By Mr. Burghart) Is this your handwriting on that or is that someone else's handwriting?

A. That's not my handwriting.

Q. So you can't tell me exactly when you told Rose about what Dr. Zhao said, correct?

A. I went and tell her the next day or the same day. I can't quite remember. But I did mention I have to have surgery for carpal tunnel.

Q. Did she tell you to talk to the Worker's Comp -- did Rose tell you to talk to the Workers' Comp folks?

A. No.<sup>1</sup>

Claimant had surgery on her wrists with Dr. Baraban, the first on February 18, 2013, on her right wrist and the second on her left wrist at a later date. Claimant testified that, post surgery, her work duties did not change and she ended up with the same problems. Claimant was off work for less than a week after each surgery. Claimant did not recall speaking with Jan Mattingly, a workers compensation adjuster for respondent on February 15, 2013. In fact, claimant did not recall talking with anyone from workers compensation.

Claimant's last day of work was February 27, 2015. She resigned because she could no longer perform the work. Claimant testified she had been living alone for over a year and was responsible for the all the household cleaning and other chores. She indicated she does the cooking and cleaning, but hires someone to do the yard work. Claimant has no hobbies.

Respondent's attorney indicated that on November 26, 2012, claimant met with nurse practitioner, Robert Loehr, and was instructed to avoid any vigorous activity and repetitive activity involving the right wrist until her symptoms resolve. Mr. Loehr works for claimant's primary care physician, Dr. Raney. An EMG and referral to an orthopedic surgeon were also recommended. Claimant testified she did not remember this visit, because she met with a lot of doctors before her surgery.

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<sup>1</sup> R.H. Trans. at 44-45.

Claimant testified she reported her pain to Rose, her supervisor, Rose's supervisor, Jerry, and Chris Simon. She did not report her pain being work-related officially until after the testing. Claimant again indicated the first time she learned her problems were work-related was on January 17, 2013, when she met with Dr. Zhao for an EMG. Afterwards, it was recommended claimant have surgery and she was sent to see Dr. Baraban on February 7, 2013. Claimant testified she had other areas with pain besides her hands and receives pain medication from her primary care physician Dr. Raney.

When questioned about when she gave notice claimant responded:

Q. Maria, if I understand your testimony, you're saying the day after your EMG test with Doctor Zhao, which occurred January 17, 2013, then on January 18, 2013, you reported to Rose Alexander that Doctor Zhao had told you your hand-arm condition was work related?

A. Yes.

Q. And, if I got this straight -- 'cause you seemed to contradict yourself just a little bit. You're kind of wishy-washy on sticking to one story which makes it confusing for everybody and makes it hard for us to know exactly what happened, but you just got done testifying that you had reported your hands hurting to your supervisor before January 18 --

A. Oh, yes, yes.

Q. -- 2013.

A. Oh, yes, yes.

Q. Let's not talk at the same time. But, I think, in the prior testimony you said you thought you had reported they were hurting from all the vacuuming and your repetitive work activities and, then, you just got done saying that you never told her that before January 18, 2013; that you only said your hands hurt, but you didn't say it was from work. So, which is it?

A. I tell her -- I talked to my boss about the pain on my hand.

Q. Are we talking about before January 18, 2013?

A. Way before I have my surgery and see doctor -- nerve doctor.

Q. We're not talking about surgery. We're talking about when you saw Doctor Zhao on January 17th 'cause you're saying the very next day you reported it was work related, according to -- you said according to Doctor Zhao.

A. Yes.<sup>2</sup>

Claimant also testified that when she did report her pain she did not indicate it was related to her work.

Q. So what I want to know is before then were you just telling Rose Alexander, my hand hurts, or were you saying there was any connection to work with your hands hurting?

A. I keep telling her my hands hurt.

Q. That's it?

A. Constantly, my hand hurting, and I didn't --

Q. So, you were not relating it to your work activities when you were telling her this; you were just saying my hands hurt.

A. Yes.<sup>3</sup>

Claimant testified that she informed Rose Alexander at least 20 times before meeting with Dr. Zhao that her hands were hurting from all the vacuuming and could she get some help doing the vacuuming. Claimant testified Rose told her she was hired to do a job and she was expected to do it.

Q. . . . Okay. So, the first you get told your condition is work related is Doctor Zhao January 17, 2013, right?

A. Yes.

Q. And you're in there the next day telling Rose Alexander Doctor -- I forgot his name -- Zhao. I think you're starting to affect me mentally. Doctor Zhao says this is work related?

A. Yes.

Q. And, so, what is Rose's response on the very next day when you're telling her this is work related, that my hand problem, what's the response from her?

A. It was not too much response to her. She said, well, if you have to have the surgery you're going to have to have the surgery.

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<sup>2</sup> CONT. OF R.H. BY DEPO. (Apr. 24, 2015) at 23-24.

<sup>3</sup> *Id.* 24.

Q. Well, did she say, here's an accident report, let's fill one out?

A. Yes. And it was not an accident report.

Q. Well, what did -- what-- you're saying when you reported this the day after seeing Doctor Zhao she said do what now?

A. We want to fill up an accident report.

Q. Okay.

A. I said --

Q. And what happened?

A. This is not an accident. To me was not an accident compared to what the doctor told me. I said, Rose, this is not an accident. This is all the years that I been working.

Q. Okay, so, it's a repetitive injury, but in your brain it wasn't an accident?

A. I wouldn't report that as an accident with workmen's comp.<sup>4</sup>

Claimant later testified Ms. Alexander volunteered to fill out an accident report, but claimant declined, and when she was presented with something to sign, claimant refused. Claimant did not believe there had been an accident at that time. Claimant cannot recall when her supervisor told her to fill out an accident report.

Claimant met with Edward Prostic, M.D., on October 6, 2014, for an examination. Claimant complained of weakness in both hands with episodes of numbness and tingling and soreness in both wrists. The history provided noted claimant's first surgery on February 21, 2013, was a right carpal tunnel release and a second surgery on November 18, 2013, on the left, was a synovectomy of the dorsum of the hand and wrist.

Dr. Prostic examined claimant, finding a scar on the right wrist from carpal tunnel surgery and weakness of pinch and grip on the right. He noted the scar on the dorsum of the hand and wrist on the left and found weakness of grip and the two-point sensory discrimination was abnormal at the thumb. The remainder of the findings in both the right and left upper extremities was determined to be normal.

Dr. Prostic opined claimant sustained injuries to both upper extremities from repetitive minor trauma during the course of her employment, developing carpal tunnel syndrome in her right wrist and synovitis of the extensor tendons of the left wrist. He noted

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<sup>4</sup> *Id.* at 31-33.

claimant continued to have significant symptoms without positive testing during the physical examination. He recommended repeat EMG testing and a study of the cervical spine, should claimant's symptoms continue. Dr. Prostin testified he mentioned the cervical spine because it is possible to have carpal tunnel syndrome from cervical radiculopathy or cervical myelopathy. Therefore, should claimant continue to have symptoms of carpal tunnel syndrome, other things should be considered such as pronator tunnel syndrome, thoracic outlet syndrome and diseases of the cervical spine.

Dr. Prostin assigned claimant a 10 percent permanent partial impairment to each upper extremity, utilizing the 4th edition of the *AMA Guides*, using either page 57, Table 16, or the Grip Index on page 65, Table 34. This converts to a 12 percent whole body impairment. Dr. Prostin determined the repetitive trauma, developed in the course of her employment, was the prevailing factor in claimant's injury, medical condition, need for medical treatment and resulting impairment.

At respondent's request, claimant met with Dr. Hall for an examination on February 12, 2015. Claimant complained mostly of discomfort in her left hand, with some discomfort in the right. She also complained of numbness and tingling in her fingers and pain in her wrists after three hours of work. Dr. Hall noted claimant had surgery on her right hand for carpal tunnel syndrome and on the left hand for extensor synovitis.

Dr. Hall examined claimant and diagnosed bilateral carpal tunnel syndrome, status post right carpal tunnel release possibly related to work; status post synovectomy on the left wrist most likely secondary to a ganglion cyst not related to work; right first CMC arthrosis not related to work; possible right index trigger finger related to work and possible left middle trigger finger related to work.

Dr. Hall opined:

Her job is the prevailing factor for her carpal tunnel syndromes. The right endoscopic release appears to have helped. I do not think anything else needs to be done for that. I think she needs a new EMG to evaluate her left carpal tunnel. If she has trigger fingers then her job is the prevailing factor as they often occur with carpal tunnel syndrome. If they exist then I would expect conservative care with an injection to help.

The symptoms on the right side that she complains about at the base of her thumb that she thinks is related to recurrent CTS, it is actually related to the first CMC arthrosis, which has nothing to do with this claim. That is a degenerative process that occurs especially to the woman as they age. It is related to wearing out of the ligament at the base of the thumb. That needs to be treated under her regular insurance.

On the left side, the cyst that she had to the dorsum of the wrist has nothing to do with her job. I believe this is a ganglion cyst which needs to be treated under her



regular insurance. Ganglion cyst do not necessarily cause pain. I was looking for something in her exam today that could and I cant find it. She says her hands hurt after about three hours of work which should not be blamed on a ganglion cyst. I may not be able to fix that. Her first surgery could not.

In summary, she needs to have a new EMG to evaluate possible carpal tunnel syndrome on the left side and that should be treated under this claim. Her trigger fingers if they exist could be secondary to work and require injections. The rest of her issues needed to be treated under her regular insurance.<sup>5</sup>

On May 17, 2015, Dr. Hall assessed claimant a 3 percent impairment to the right upper extremity at the wrist and a 3 percent impairment to the left upper extremity at the wrist based on the 4th Edition of the *AMA Guides*. He also opined claimant is capable of engaging in substantial and gainful employment.

On cross-examination Dr. Hall acknowledged the *AMA Guides*, on page 57, Table 16, listed a mild carpal tunnel impairment as 10 percent. There is no 3 percent impairment rating contained in that rating table. The doctor went on to explain that the *Guides* were "just a guide."<sup>6</sup> He further explained a physician is allowed discretion under the *Guides* in assigning ratings.<sup>7</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2012 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(e) states:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the

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<sup>5</sup> Hall Depo., Ex. 2 at 3 (Dr. Hall's Feb. 12, 2015, IME Report).

<sup>6</sup> *Id.* at 17.

<sup>7</sup> *Id.* at 20.

injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

Claimant's testimony that she began having bilateral hand and wrist complaints for several months before her February 18, 2013, surgery, and that she voiced complaints of those problems to her supervisor during that several month period is basically uncontradicted. Claimant's supervisor, Ms. Alexander, did not testify in this matter.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>8</sup>

Claimant also testified that her visits to her personal physician, Dr. Raney, never resulted in her being advised by the doctor that her bilateral hand problems were related to her job with respondent. Respondent argues claimant was advised by Dr. Raney to avoid doing things with her right wrist, which could be seen as modified or restricted duty. However, there is no indication that Dr. Raney diagnosed claimant's condition and used that diagnosis as the basis for the restrictions.

Dr. Raney sent claimant to Dr. Zhao for EMG testing, resulting in the bilateral carpal tunnel syndrome diagnosis. This diagnosis was provided to claimant with the explanation that the condition was related to claimant's employment with respondent. This examination and diagnosis occurred on January 17, 2013, and would establish the appropriate date of injury by repetitive trauma in this matter. The determination that claimant's date of repetitive trauma occurred on January 17, 2013, is affirmed.

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<sup>8</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

K.S.A. 2012 Supp 44-520(a)(1) states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

Claimant testified that she advised respondent of the test results and diagnosis by Dr. Zhao, the day after the examination. This establishes the appropriate notice as required by statute. Respondent's contention that claimant contradicted herself during her testimony is not supported by this record. Claimant did become confused at times during cross-examination, but her testimony about her conversations with Ms. Alexander are persuasive and the Board finds this testimony convincing. Claimant provided timely notice of these injuries by repetitive trauma. The Award of the ALJ on this issue is also affirmed.

K.S.A. 2012 Supp. 44-510e(a)(2)(A)(i) states:

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

(i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;

Both Dr. Prostic and Dr. Hall rated claimant's upper extremities pursuant to the *AMA Guides*, 4th Edition. However, Dr. Hall used the *Guides* more as a guideline and appeared to actually reject instructions regarding how to rate a mild case of carpal tunnel syndrome. The ALJ found, and the Board agrees, that the opinion of Dr. Prostic is more persuasive and appears to be more in line with the intent of the *AMA Guides*. The award of a 10 percent functional impairment to each upper extremity which then combine to a 12 percent whole person impairment is affirmed.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has satisfied her burden of proving she suffered injuries to her upper extremities by repetitive trauma while working for respondent, with a date of injury of January 17, 2013, with timely notice being provided. The Award of a 12 percent whole body functional impairment is also affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated September 30, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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